IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Civil Second Appeal No.141/1995

Major Kanhaiya Lal S/o Shri Gangadan (since deceased)
Through his L.Rs. Smt. Shanti Devi & Others
...plaintiff-appellants
Versus
Banwari Lal S/o Shri Ram Kishore (since deceased)
Through his L.Rs. Mishri Devi & Others
...defendant-respondents

Date of Judgment ::: 19.10.2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri N.K. Maloo, with
Shri Vinod Kumar Tamoliya, Counsel for appellants
Dr. Prakash Chandra Jain, with
Shri Rajesh Chaturvedi, Counsel for respondents
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//Reportable//
By the Court-

Heard learned counsel for the parties.

This second appeal under Section 100 of the C.P.C., on behalf of the plaintiff-appellants is directed against the judgment and decree dated 1.3.1995 passed by the Additional Civil Judge No.2, Alwar, in Civil Appeal No.30/1991, whereby the appeal of the plaintiff-appellants was dismissed and the judgment and decree dated 30.3.1979 passed by the lower court dismissing the suit, was affirmed.

While admitting the second appeal, this court

formulated the following substantial questions of law:-

> "1. Whether the First Appellate Court erred in dismissing the plaintiffs applications under Order 41 Rule 27 filed on 28.10.1991 and 22.4.1994 seeking to place on record certified copies of public documents, which were beyond doubt and required no formal proof, number of documents were more than 30 years old and other being certified copies of the municipal record, which were not required formal proof. The applications were dismissed on irrelevant grounds.
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> 2. Whether right of easement is attached to dominant heritage and is available against survient heritage, whosoever may be owner or resident in the property and not to person. The findings of the two Courts-below are vitiated on this account.
>
> 3. Whether findings are vitiated on account of non-reading and misreading of oral and documentary evidence."

Briefly stated the facts of the second appeal are that sole plaintiff Kanhaiyalal filed a suit for mandatory injunction to remove the disputed wall marked as 'A' and 'B' and further for prohibitory injunction. It was pleaded in the plaint that one room of the house of the plaintiff is situated towards

western side on the roof of the shop of the defendant for last about 80 years when the plaintiff became the owner of the property in dispute. It was further pleaded that the plaintiffs are using the disputed gate and way since 1893. They used to go 'Sadar Bazar' through the said gate via roof of shop of the defendants. The defendants have raised a wall marked as 'A' and 'B', closing the way of the plaintiff and further they want to close their windows, doors etc., whereas they have acquired a right of easement by prescription. The suit was contested by the defendants. Both the parties led oral and documentary evidence. The learned lower court vide its judgment dated 30.3.1979 dismissed the suit of the plaintiffs. Being aggrieved with the same, an appeal was preferred.

The learned first appellate court vide its judgment and decree dated 7.9.1981 allowed the appeal and remitted the case back to the lower court. The order of remand passed by the first appellate court was challenged by the defendants before this court and vide judgment dated 26.7.1982 this court set-aside the order of remand passed by the first appellate court and remanded the matter to the first appellate court to hear the case on merits. Thereafter, the first appellate court dismissed the appeal vide impugned

judgment and decree dated 1.3.1995, which has been impugned in the present second appeal.

The learned counsel for the appellants, Shri N.K. Maloo, contended that during the pendency of the first appeal, the plaintiff-appellants filed an application on 22.4.1994 under Order 41 Rule 27 of the C.P.C. along with five documents, as mentioned in the application, which were certified copies of the judgment dated 17.12.1883, Patta dated 13.12.1883, the Patta and judgment dated 28.9.1927. All these documents were relating to the disputed property itself and they were necessary and helpful in deciding the present controversy in between both the parties. He contended that the first appellate court vide its order dated 30.8.1994 wrongly dismissed the application of the plaintiff, therefore, the judgment and decree passed by the first appellate court is liable to be set-aside. In support of his contention, the learned counsel for the appellants relied upon the following decisions:-

(1) Wadi Vs. Amilal & Others - 2002 WLC (SC) Civil 726;

(2) Murlidhar Vs. Nand Kishore & Others - 2006

(3) WLC (Rajasthan) 264; and,

(3) Billa Jagan Mohan Reddy & Another Vs. Billa Sanjeeva Reddy & Others – (1994) 4 SCC 659.

Per contra, Dr. Prakash Chandra Jain, learned counsel for the defendant-respondents, contended that the learned first appellate court was justified in dismissing the application of the plaintiff-appellants under Order 41 Rule 27 of the CPC filed on 22.4.1994. He contended that the learned first appellate court has assigned good reasons for rejecting the application. He further contended that the documents in question, which have been filed along with the application are not at all material and relevant if the same are read along with the pleadings of the parties. He also referred to the provisions of Section 4 and 15 of the Indian Easements Act, 1882 and contended that these documents cannot be said to the relevant documents. He further contended that four applications were filed by the plaintiffs-appellants under Order 41 Rule 27 of the CPC from time to time, out of them, two applications were allowed and two were rejected. He further contended that the

appellants have not given any cogent reasons for allowing the application dated 22.4.1994 under Order 41 Rule 27 of the CPC.

I have considered the submissions of learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of both the courts below.

In Wadi Vs. Amilal & Others – 2002 WLC (SC) Civil 726, the Hon'ble Supreme Court considered the provisions of Order 41 Rule 27 of the CPC and held that if the appellate court requires any document to be produced or any evidence to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. Paragraph 7 of the above judgment is reproduced as under:-

> "7. Now it is clear that Rule 27 deals with production of additional evidence in the appellate court. The general principle incorporated in sub-rule (1) is that the parties to appeal are not entitled to produce additional evidence (oral or documentary) in the appellate court to cure a lacuna or fill-up a gap in a case. The exceptions to that principle are enumerated

> there-under in clauses (a), (a) and (b). We have concern here with clause (b) which is an enabling provision. It says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in absence of such evidence would result in a defective decision and to pronounce a defective judgment, admission of such evidence is necessary, clause (b) enables it to adopt that course. Invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of material on the record it reveals that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case."

This court in Murlidhar Vs. Nand Kishore & Others - 2006 (3) WLC (Rajasthan) 264, considered various judgments on the point including the above referred judgment of the Hon'ble Apex Court in Wadi Vs. Amilal & Others (Supra) and held that if the documents produced under Order 41 Rule 27 of the CPC are relevant, then the same should be taken on the record and be considered.

In Billa Jagan Mohan Reddy & Another Vs. Billa Sanjeeva Reddy & Others – (1994) 4 SCC 659, the Hon'ble Supreme Court considered the provisions of Order 13 Rule 1 and Order 41 Rule 27 of the CPC and observed that the explanation for delay is not as rigorous as one filed under Section 5 of the Limitation Act. The Hon'ble Supreme Court further observed that it is settled law that, if the documents are found to be relevant to decide the real issue in the controversy, and when the court felt that interest of justice requires that the documents may be received, exercising the power under Order 41 Rule 27 of the CPC, the appellate court would receive the documents and consider their effect thereof. Paragraph 4 of the aforesaid judgment is reproduced as under:-

> "4. Order 13, Rule 1 provides thus:
> "1. Documentary evidence to be produced at or before the settlement of issues. – (1) The parties or their pleaders shall produce, at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which this Court has ordered to be produced.

(2) The Court shall receive the documents so produced:
Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs."

It is clear from its bare reading that the parties or their counsel shall be required to produce all the documentary evidence in their possession or power which they intend to rely on to establish their right along with pleadings or before settlement of the issues. The court is enjoined under sub-rule (2) to receive such documents provided they are accompanied by an accurate list thereof prepared in the prescribed form. If they are not in the party's possession or custody, it shall be filed by the party along with an application to condone the delay in filing them. The explanation for delay is not as rigorous as one filed under Section 5 of the Limitation Act. These documents were not in the possession or custody of the appellants, but they have obtained certified copies from the Revenue Authorities and sought to be produced. It is in doubted that there is a delay in production of the said documents. But the trial court had stated that the application was filed at the stage of arguments, seeking to produce those documents and sought to rely upon the documents. It is settled law that, if the documents are found to be relevant to decide the real issue in the controversy, and when the court felt that interest of justice requires that the documents may be received exercising the power under Order 41, Rule 27 CPC the appellate court would receive the documents

> and consider their effect thereof. When such is the position, when the documents are sought to be produced in the trial court, before the arguments are completed, normally they may be received; and opportunity given to prove them and rebuttal if any and their relevance and effect they may have, be considered in deciding the issue arising in the controversy. Under these circumstances, the trial court was not justified in refusing to condone the delay and to receive the documents. The High Court also committed the same error in not considering the effect in this behalf in the right perspective. The orders are accordingly set aside and the delay in filing the documents is condoned. The trial court is directed to receive the documents, give an opportunity to the parties to prove the documents and if necessary, opportunity to the respondent to rebut the same and then dispose of the reference according to law."

The above referred citations as well as the provisions of Order 41 Rule 27 of the CPC make it clear that if the documents are relevant then the same can be admitted in evidence and delay in filing the application cannot come in the way of any of the party to produce the material and relevant document. The plaintiff filed the application dated 22.4.1994 under Order 41 Rule 27 of the CPC before the first appellate court whereby he produced following documents:-

1. Nakal Misal Register No.150 – Judgment dated 17.12.1883 State Vs. Bhim Singh (In Urdu);
2. Hindi Translation of document no.1;
3. Copy of Patta – Bhim Singh S/o Mangal and Hanot Singh S/o Bhim Singh, dated 13.12.1883 (In Hindi and Urdu both), therefore filed along with Hindi translation;
4. Copy of map and Patta – State Vs. Bhim Singh & Hanot Singh, dated 13.12.1883
5. Copy of Patta with Khasra versus Bihari Lal, Judgment dated 28.9.1927

It has been stated in the application that these documents were in Urdu language and the plaintiff was having no knowledge about these documents nor these documents were in the knowledge of his counsel. These documents were in Urdu language, therefore, he contacted one Shri Gulab Singh, Advocate, and got them translated, who translated the

same and gave him on 18.4.1994. Thereafter he delivered the same to his counsel Shri Gopal Sharma, who certified them. In these circumstances, the delay was explained. It was specifically mentioned that these documents were not in possession of the plaintiff and the same were received from the Archeology Department. It was also mentioned that all these documents are public documents and thirty years old and there cannot be any doubt on their genuineness and they are relevant also for the purpose of deciding the present controversy. The application was supported by an affidavit also. The said application was contested by filing a written reply dated 8.7.1994 by the defendants wherein it was mentioned that the documents could have been procured by the plaintiff earlier also because they were in existence. The plaintiff has not given any cogent reason for not producing the same documents earlier. Therefore, it was prayed that the application may be dismissed.

The first appellate court vide its order dated 30.8.1994, while dismissing the application of the plaintiff, assigned mainly two reasons that there is delay in filing the application and the documents in question are not relevant for the purpose of deciding the controversy in between both the parties.

A bare perusal of the order dated 30.8.1994, passed by the first appellate court, goes to show that he has not considered the above referred five documents in detail, which were relevant to the disputed property itself. The first appellate court did not consider that the defendants, in their reply to the application, did not challenge the genuineness of the document in question. The objection of the defendant was only that no reason has been assigned for not producing the said document in the lower court. The position of law is that in case the documents are held to be relevant then the delay should not come in the way of the party to produce the relevant documents. The learned first appellate court has not assigned any reason in its order dated 30.8.1994 for holding that these documents are not relevant.

This court has examined each and every document in detail. These documents relate to the year 1883 and 1927. This is a case of right of easement. These documents clearly show the existence of the property and the window, ventilator and gate in the disputed property, for which right of easement is claimed. The plaintiff purchased his house/property from Bhim Singh and copy of the sale-deed has already been placed on

the record as Exhibit-4. Bhim Singh purchased the property, in dispute, from the State. The judgment dated 17.12.1883 is in between the State and Bhim Singh whereby Bhim Singh purchased the property in question and thereafter Bhim Singh sold the same to the plaintiff. In all these documents, existence of 'Nala', 'Parnala', windows, ventilator, gates, etc., have been mentioned. The disputed gate/passage, whereby the plaintiffs use to come and go, has also been mentioned. One of the document shows that before issuing 'patta' to Bhim Singh, a notice was given to the defendants and objections were invited and after hearing their objections an opportunity was given to them to get the order from the competent authority in their favour but when they failed to do so then only the 'patta' was issued in the name of Bhim Singh, from whom the plaintiff purchased the property, in dispute. The question of dominant and servient heritage, ownership as well as prescriptive easementary rights are to be decided in the main suit, therefore, this court is of the view that all these documents were necessary for the purpose of deciding the real controversy in between both the parties and the learned first appellate court has committed a serious illegality in rejecting the application of the

plaintiff dated 22.4.1994 filed under Order 41 Rule 27 of the CPC vide order dated 30.8.1994, and I am of the firm view that the order dated 30.8.1994 passed by the first appellate court is liable to be set aside and the application of the plaintiff is liable to be allowed.

In view of the above facts and circumstances and discussion made, the question no.1 formulated above, is decided in the manner that the first appellate court erred in dismissing the plaintiffs' application dated 22.4.1994 under Order 41 Rule 27 of the CPC.

Since the question No.1 formulated above is decided in favour of the plaintiff-appellants then naturally the documents, in question, are to be taken on the record and the opposite-party has to be given an opportunity to file any documents in rebuttal and for the said purpose the case has to be remanded back to the lower court, therefore, it is not necessary to decide the remaining question no.2 and 3 formulated in this second appeal.

Consequently, the second appeal is allowed. The judgment and decree passed by both the courts below are set aside and the case is remitted back to the lower court with a direction to receive the documents

of the plaintiff filed along with the application dated 22.4.1994 before the first appellate court in evidence. The lower court will give an opportunity to the parties to prove the documents and if necessary, opportunity to the defendants to rebut the same and then dispose of the suit according to law.

Both the parties are directed to appear before the lower court on 4th of December, 2006. The registry is directed to remit the record of both the courts below immediately to the lower court.

Costs is made easy.

(Narendra Kumar Jain) J.

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